IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8970 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ISMAIL ALLARAKHA BADSHAH

Versus

POLICE COMMISSIONER, SURAT CITY.

Appearance:

MR EE SAIYED for Petitioner

MR KAMAL MEHTA, Ld. APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 19/03/98

ORAL JUDGEMENT

By this application, under Article 226 of the Constitution of India, the petitioner who is the detenu, calls in question the legality and validity of the detention order, passed by the Commissioner of Police, Surat City, on 29th November, 1997, invoking his powers under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"); consequent upon which the petitioner came to be arrested

and at present kept under detention.

2. In order to appreciate the rival contentions, necessary facts in brief may be stated. Against the petitioner two complaints came to be lodged, with Mahidharpura Police Station - Surat. As alleged in one complaint, the petitioner committed the offences punishable under Sections 384, 385, 386, 387 r.w. under Section 114 of the Indian Penal Code. In another complaint as alleged, the petitioner committed the offences punishable under Sections 392 and 506 r.w. under Section 114 of the Indian Penal Code. The petitioner had while committing these offences used a knife and put those who resisted, in instant fear of death or grievous hurt. The Commissioner of Police, having come to know about such complaints made detailed inquiry, and after inquisition, he could note that the petitioner was a head-strong person and by his subversive activities, he was disturbing the public order and terrorising the people. He was extorting money, wringing and causing damage to the properties. By diabolism, he used to cause the people to bend his way. His hellish and infernal activities disturbing public order and spreading pandemonium were going berserk. No one was, therefore, ready to come forward and state against him. After a great persuation and when assurance was given that the facts about them disclosing their identity would be kept secret, some of the witnesses have under great tension stated against the petitioner. After a deep inquiry, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, ordinary law was falling short, sounding dull. The only way out to hold him in kittle was to detain him under the Act. He, therefore, passed the impugned order. Consequent upon the same, the petitioner came to be arrested and at present, he is kept under detention.

3. The petitioner has challenged the order of detention on several grounds, but, at the time of hearing, the learned advocates representing the parties confined to the only point namely exercise of privilege under Section 9(2) of the Act. According to the petitioner's learned advocate without any just cause and without applying the mind, the authority passing the detention order exercised the privilege, and therefore, the continued detention is illegal. For want of necessary particulars, the petitioner was misled, could not decide what to do in the matter. His right to make effective representation was impaired. In reply, Mr.

Kamal Mehta, learned APP, has submitted that the authority passing the detention order had considered all relevant factors and material placed before him. After careful study he was satisfied about the exercise of the discretion. When accordingly the discretion is exercised after careful study, in the public interest, the satisfaction reached by the detaining authority is not vitiated. There is, therefore, no reason to interfere with the order on the ground of exercise of privilege. The petitioner has garbled.

4. When both have confined to the only point about the exercise of privilege, I will confine to the said ground alone going to the root of the case. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at anytime by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the

disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N.Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761. may be made.

5. In view of such law, the authority passing the detention order has to satisfy the Court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. No affidavit has been filed by the Police Commissioner who passed the order of detention. When no affidavit is filed, I am entitled to infer against the authority passing the order, and it can be assumed that without just and proper cause, privilege has been exercised, and without application of mind, the decision was taken by the authority. Reading the order, it appears that task of inquiry was entrusted to other Police Officer to find out whether fear expressed by the witnesses was genuine or imaginary or empty excuses. The Police Commissioner, without studying personally the report submitted by the Police Officer, has accepted the same. When he has mechanically accepted the report, his satisfaction is vitiated, and therefore, the privilege exercised, being unjust and improper, the order of detention must be held to be unconstitutional and

illegal.

6. For the aforesaid reasons, this petition is allowed. The order of detention passed on 29th November, 1997, by the Commissioner of Police, Surat City, is hereby quashed and set aside; and the petitioner-detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule accordingly made absolute.

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